

**HIGH COURT OF ORISSA: CUTTACK**

**ARBA NO.38 OF 2019**

In the matter of an Appeal under Section 37 of the Arbitration and Conciliation Act, 1996.

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Forum Projects Private Limited, ..... Appellant  
Kolkata

-Versus-

Berhampur Development Authority, ..... Respondent  
Berhampur, Ganjam

For Appellant : M/s. A.P.Bose, V.Kar, D.J.Sahoo,  
S.K.Hota & A.Pattnaik

For Respondent : Mr.S.P. Mishra, Sr. Advocate  
M/s Bhabani Shankar Panigrahi

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*Date of Hearing by Virtual Mode on 17.11.2020*  
*Judgment delivered by Virtual Mode on 02.12.2020*  
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**P R E S E N T:**

**THE HONOURABLE SHRI JUSTICE K.R. MOHAPATRA**

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**K.R. Mohapatra, J** This appeal under Section 37 of the Arbitration Conciliation Act, 1996 (for short, the Arbitration Act') has been filed assailing the order dated 18.10.2019 (Annexure-1) passed by learned District Judge, Ganjam, Berhampur in Arbitration Petition No.4 of 2018, whereby he dismissed a petition filed by the present

Appellant-Company under Section 9 of the Arbitration Act holding it to be not maintainable.

2. Short narration of facts necessary for proper adjudication of this appeal are that pursuant to a 'Request for Proposal' (RFP) by the Respondent - Berhampur Development Authority (BDA) for development of Integrated Commercial – cum - Residential Complex in Berhampur, the Appellant had participated in the bid and became the highest bidder having quoted an amount of Rs.9.40 crore. The project was decided to be undertaken on a Public Private Partnership (PPP) basis. Upon compliance of initial formalities and deposit of 25% of the bid amount, i.e., Rs.2.35 crore, the Respondent-BDA issued Letter of Intent (LOI) on 16.06.2008 in favour of the Appellant-Company requesting the Appellant to deposit the balance contractual bid amount within a period of 180 days and to execute the agreement. But, the Appellant could not deposit the balance contractual bid amount of Rs.7.05 crore within a stipulated period of 180 days. Hence, the LOI issued in favour of the Appellant was cancelled vide Order No.250/BeDA Berhampur dated 03.03.2015. Assailing the same, the Appellant filed W.P.(C) No.8653 of 2015 before this Court. This Court by order dated 11.05.2015, while issuing notice in the matter, passed the following interim order.

*“The opposite parties shall not issue (sic) any work order to anybody until further orders, subject to the petitioners depositing of Rs.2.75 crores before the Registrar (Judicial) of this Court in shape of A/C payee bank draft within a period of two weeks hence. In the event, the petitioners will not pay the same within the time stipulated, this interim order will stand vacated.”*

However, the Appellant could not deposit the said amount. Subsequently, the Appellant moved learned District Judge, Berhampur in Arbitration Case No.04 of 2018 under Section 9 of the Arbitration Act with the following prayer:-

*“It is therefore prayed that your honour may graciously be pleased*

- a. To preserve the entire premises and necessary order in this regard be passed for its interim custody;*
- b. Injunct the opp. party from creating any third party interest over the schedule property and obstructing the entry of the petitioner or his representatives to the schedule premises;*
- c. Cost of the proceeding be awarded in favour of the petitioner;*
- d. Any other relief as deem fit and proper be awarded in favour of the petitioner.”*

2.1 Along with the petition under Section 9 of the Arbitration Act, the Appellant had also filed an interim application praying *inter alia* to direct the parties to maintain *status quo* in respect of the property in question. Upon receipt of notice, the Respondent (opp. party therein) appeared and filed a petition on 18.09.2018 raising an issue with regard to maintainability of the petition under Section 9 of the Arbitration Act. Both the petitions, namely, petition with regard to maintainability as well as

injunction were heard and disposed of on 18.10.2019 by a common order under Annexure-1, which is under challenge in this appeal.

3. Mr. Bose, learned counsel for the Appellant submitted that the impugned order is an outcome of non-application of judicial mind. The Respondent, accepting the initial deposit of Rs.2.35 crore paid by the Appellant, issued the LOI as well as draft Lease-cum-Development Agreement to the Appellant. It was returned to BDA being signed by the authorized signatory of the Appellant, which was accepted in a joint meeting held on 08.09.2009 as a token of acceptance of the proposal made by the Respondent. Clause 32.2 of Part-II of the draft agreement contains the Arbitration Clause, which reads as follows:

**“32.2 Arbitration**

*In the event of Dispute arising out of or in connection with this Agreement not being resolved in accordance with the provisions of Article 32.1 above, either Party shall be entitled to, by notice in writing (“**Arbitration Notice**”) to the other Party, refer such Dispute for final resolution by binding arbitration in accordance with the Arbitration & Conciliation Act, 1996:*

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3.1 It is his submission that since the project was undertaken on Public Private Partnership (PPP) basis, signing of the draft agreement by the Contractor, namely, the Appellant makes it a concluded contract. He further submitted that the Respondent, in paragraph 19 of their counter affidavit filed in

W.P.(C) No.8653 of 2015 have categorically admitted that there is an arbitration clause to resolve the dispute between the parties arising out of the contract in question. Thus, there should be no confusion with regard to existence of an arbitration clause in the agreement. Accordingly, the petitioner in order to protect the *lis* had filed the petition under Section 9 of the Arbitration Act.

3.2 The Respondent, after accepting the draft agreement signed by the Appellant and issuance of LOI, is precluded from raising an objection with regard to non-execution of the agreement.

3.3 The draft agreement was filed before learned District Judge along with the petition under Section 9 of the Arbitration Act. But, learned District Judge failed to take notice of the same and made an erroneous observation to the effect that no written argument was filed, which is an error apparent on the face of the record.

4. W.P.(C) No.8653 of 2015 has been filed assailing the action of the Respondent in cancelling the LOI unilaterally. Thus, pendency of the writ petition does not affect in anyway the maintainability of the petition under Section 9 of the Arbitration Act, as the cause of action for filing of both the petitions is completely different. Thus, learned District Judge failed to appreciate the scope of petition filed under Section 9 of the

Arbitration Act. As such, the impugned order being not sustainable is liable to be set aside and a direction may be made to adjudicate the petition filed under Section 9 of the Arbitration Act afresh on merit by issuing necessary interim direction.

5. Mr. Mishra, learned Senior Advocate for the Respondent refuting the submissions made by learned counsel for the Appellant, submitted that after issuance of LOI, the Appellant did not come forward to deposit the balance bid amount of Rs.7.05 crore within the stipulated period and also to execute the Lease-cum-Development Agreement (LCDA). As such, there is no concluded contract between the parties in the eyes of law. Due to non-cooperation of the Appellant neither any agreement could be executed between the parties nor could it be registered as required under Section 17 of the Registration Act, 1908 in order to make the draft agreement a concluded contract between the parties. As such, the Clause- 32.2 of the Part-II of the draft agreement cannot confer any right on the Appellant to invoke the arbitration clause.

6. Learned District Judge considering the rival contentions of the parties as well as materials available on record, has rightly come to a conclusion that the Appellant has not filed any written agreement. The averments made by Respondent-BDA at paragraph-19 of the counter affidavit filed in W.P.(C) No.8653 of

2015 cannot confer any right on the parties to invoke the arbitral clause in absence of any concluded contract to that effect. In support of his case, he relied upon a decision in the case of ***M/s. National Highways and Infrastructure Development Corporation -v- BSPL Infrastructure Limited***, reported in (2019) 15 SCC 25.

7. Mr. Mishra, with reference to Section 7 of the Contract Act, 1872 further submitted that in order to transform a proposal into promise, the acceptance must be absolute. In absence of any concluded contract between the parties the arbitration clause in the draft agreement cannot be made operational. In support of his contention, he relied upon the case of ***M/s P.S.A. Mumbai Investments PTE. Limited -v- Jawaharlal Nehru Port Trust***, reported in (2018) 10 SCC 525.

8. Mr. Mishra, learned counsel for the petitioner further submitted that although an interim protection was granted to the Appellant, it did not comply with the same. As such, the interim order becomes ineffective after lapse of the stipulated period of two weeks within which the Appellant was required to deposit a sum of Rs.2.75 crore before the Registrar (Judicial) of this Court in shape of A/c payee bank draft.

9. The object of Section 9 is to make interim arrangement to protect the *lis* before or during arbitral proceeding or at any time after making of the arbitral award. Since an interim protection has already been granted by this Court on 11.05.2015 in W.P.(C) No.8653 of 2015, a proceeding under Section 9 of the Arbitration Act is not maintainable. It is a different issue that the Appellant did not respect the interim protection granted by this Court, by complying with the condition to make it operative. Even otherwise, the demeanor of the Appellant does not entitle it to a protection under Section 9 of the Arbitration Act. The Appellant instead of complying with the condition imposed in the interim order passed by this Court, waited for three years and filed the instant proceeding under Section 9 of the Arbitration Act in the year 2019. Thus, the intention of the Appellant is apparent to delay the matter and drag the litigation. In view of the above, the impugned order warrants no interference and the appeal is liable to be dismissed.

10. Upon hearing learned counsel for the parties and on perusal of the record, it appears that the Appellant was the highest bidder in the RFP by quoting the bid amount of Rs.9.40 crore. The Appellant also made an initial deposit of 25% of the bid amounting to Rs.2.35 crore and he was required to deposit the balance amount of Rs.7.05 crore within a period of 180 days from the date

of issuance of LOI dated 16.06.2008 in its favour. It did not deposit the said amount for which the LOI was cancelled vide order dated 03.03.2015 and the initial bid amount deposited by the Appellant was forfeited as well. Assailing the same, W.P.(C) No.8653 of 2015 was filed by the Appellant, which is sub-judice. This Court also passed a conditional interim order on 24.01.2020 in Misc. Case No.78 of 2019 (supra). But the condition imposed was not complied with within the stipulated period of two weeks for which the protection granted in the interim order lapsed. It further appears that the Respondent-BDA had sent a copy of Draft Lease-cum-Development Agreement to the Appellant. Although the Appellant claims to have signed and submitted the same to the Respondent as token of its acceptance of the offer, but, Respondent on the other hand, took a stand that the Appellant did not come forward to execute the agreement by depositing the balance bid amount. But, the fact remains that the Appellant never deposited the balance bid amount of Rs.7.05 crore within the stipulated date, which was a condition for execution of agreement.

11. The arbitration clause can only be made operational /invoked, if there is a concluded contract between the parties. Hon'ble Supreme Court in the case of M/s. **P.S.A. Mumbai**

**Investments PTE Ltd.** (supra) at paragraphs 14, 19 and 20 held as follows:

“14. Under Section 7 of the Indian Contract Act, 1872 in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. It is clear on the facts of this case that there is no absolute and unqualified acceptance by the Letter of Award – two or three very important steps have to be undergone before there could be said to be an agreement which would be enforceable in law as a contract between the parties.

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19. Mr. Dave also strongly relied upon the judgment in *INOX Wind Ltd v. Thermocables Limited*. This judgment in paras 17 to 19 thereafter made it clear that an exception to the general rule laid down in *M.R. Engineers and Contractors Private Limited* as to standard forms of practice containing arbitration clauses would be extended also to standard forms between individual persons and not merely standard forms of professional assessments.

20. We may hasten to add that this judgment in *INOX Wind Ltd v. Thermo cables Ltd.* case would have no manner of application on the facts of this case for the reason that it has been found by us that there is no agreement between the parties at all in the facts of the present case, making it clear, therefore, that the arbitration clause contained in the draft Concession Agreement would not apply. Further, even the without prejudice argument of Mr. Sibal is worthy of acceptance. Mr. Sibal argued, relying strongly upon *M.R. Engineers and Contractors (P) Ltd.*, that assuming that there was an arbitration clause which governs the parties, the said clause would be wholly inapt as it would only cover disputes between a Special Purpose Vehicle and the Respondent No.1 arising from the Concession Agreement not yet entered into,

*and not between the Respondent No.1 and the appellant and Respondent No. 2. He is correct, and we agree with this contention as well.”*

*(emphasis supplied)*

11.1 In the case of **National Highway (supra)** the Hon'ble Supreme Court following the ratio decided in the case of **M/s. P.S.A Mumbai Investments PTE** Ltd. (supra) at paragraph 16 held as follows:

*“16. It is not possible to say that a standard form arbitration clause contained in a draft agreement would then oust Clause 6.1 and disturb the entire scheme of the schedule of bidding process. This being the case, it is clear that even at the stage of acceptance of LOA, if disputes arise between the parties, they can only be resolved by the courts of Delhi and not by arbitration. This being case, it is clear that PSA Mumbai Investments Pte. Ltd. judgment is, in fact, on all fours and would govern the facts of the present case.”*

12. In view of the ratio decided by Hon'ble Supreme Court, it is crystal clear that in order to invoke the arbitration clause and make it operational, there must be a concluded contract between the parties as envisaged under Section 7 of the Contract Act, 1872 which is conspicuously absent in the case at hand, in view of the aforesaid reasons.

13. Although Mr. Bose, learned counsel for the Appellant vehemently argued that an agreement in a project under PPP mode is not required to be signed by the Principal, but he could not produce any material in support of his contention.

14. It is not clear as to why the Appellant preferred to file writ petition in W.P.(C) No.8653 of 2015 assailing cancellation of the LOI instead of invoking the arbitration clause, if at all it was available to be invoked. It further appears that this Court considering the case of the Appellant had also granted an interim protection subject to compliance of certain conditions. The Appellant did not comply with the said conditions. As such, the interim protection granted by this Court lost its effect by efflux of time. The averment at paragraph 19 of the counter affidavit filed by the Respondent-BDA in W.P.(C) No.8653 of 2015 cannot confer a right on the parties to invoke arbitration clause or confer jurisdiction on the arbitrator to arbitrate the dispute, if at all it was not there in the agreement itself. As has been discussed earlier there is no concluded contract between the parties. Thus, the Appellant could not have invoked the jurisdiction of learned District Judge under Section 9 of the Arbitration Act, more particularly when an interim protection in respect of the *lis* has already been granted by this Court in W.P.(C) No.8653 of 2015.

15. In view of the discussions made above, this Court is of the considered opinion that learned District Judge has committed no error in holding the petition under Section 9 of the Arbitration Act not maintainable. Accordingly, this appeal being devoid of any

merit stands dismissed, but in the circumstances there shall be no order as to costs.

15.1 Delink W.P. (C) No. 8653 of 2015 to be listed before the assigned Bench.

15.2 LCR be sent back immediately.

15.3 Authenticated copy of this order downloaded from the website of this Court shall be treated at par with the certified copy of this order in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.

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**K.R.MOHAPATRA, J.**